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No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,

Appellants,

vs.

THE FEDERAL ELECTION COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANTS

JEFFREY COLE
180 North LaSalle Street
Suite 3100
Chicago, Illinois 60601
(312) 782-8300
Counsel for Appellants

Of Counsel:
STANLEY T. KALECZYC
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 659-3180

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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QUESTIONS CERTIFIED

1. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, infringes appellants' right of assembly guaranteed by the First Amendment.*

---

* The form and phrasing of the first certified question is the district court's. In our request for certification, the question was broadly phrased—"whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, violates the First Amendment." *See* Record at 70. The breadth of the question was dictated by the scope of our Complaint which alleged that the Act was "an unconstitutional abridgement of plaintiffs', *their members' and their members' employees'* rights of freedom *of speech and* association in that:

"(a) By conditioning Plaintiffs' right to communicate on corporate consent, § 441b(b)(4)(D) imposes a prior restraint on the expression of political thoughts and ideas;

"(b) Section 441b(b)(4)(D) constitutes an impermissible burden on the right of the Plaintiffs to solicit contributions, thereby resulting in an improper restraint on Plaintiffs' rights to communicate with members of the electorate;

"(c) Section 441b(b)(4)(D), by restricting the class of permissible solicitees to stockholders and executive and administrative personnel (and families) of member corporations, impermissibly interdicts Plaintiffs from having the opportunity to associate with anyone other than those defined in the Act;

"(d) Section 441b(b)(4)(D) deprives Plaintiffs of the right to freely associate with large segments of the electorate who have or may have an affinity of interest with Plaintiffs, and it prevents that segment of the electorate from having the opportunity to associate with Plaintiffs toward common political ends;

"(e) Section 441b(b)(4)(D)'s restriction that only one trade association can solicit the stockholders and executive and administrative personnel of a given mem-

(footnote continued)

2. Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, deprives appellants of liberty without due process of law in violation of the Fifth Amendment.

3. Whether the failure of the Federal Election Campaign Act Amendments of 1976 to define the term "solicitation" infringes appellants' right of assembly guaranteed by the First Amendment, or deprives appellants of liberty without due process of law in violation of the Fifth Amendment.

(footnote continued)

ber corporation impermissibly and absolutely restricts the communication of political expression by any and all other trade associations and impermissibly curtails the right of Plaintiffs and large segments of the electorate to freely associate with each other. * * *" Joint Appendix ("J.A.") at 24-25 (Emphasis supplied). *See also* J.A. at 23, ¶ 26.

The district court was directed by the Seventh Circuit to "identify the constitutional and fact issues *raised by the complaint*" and to certify those questions to the Court of Appeals. *See* Bread Political Action Committee v. FEC, 591 F.2d 29, 36 (7th Cir. 1979) (Emphasis supplied). The minority opinion dealt with each of the questions raised in our Complaint and subsumed in the first question posed for certification by the Appellants.

TABLE OF CONTENTS

	PAGE
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
Summary	1
The proceedings and opinions below	6
Summary of argument	8
Argument:	
I. Jurisdiction over this appeal is proper under 2 U.S.C. §437h	11
II. Section (D), both facially and as applied, constitutes a prior restraint on the speech and associational freedoms of plaintiffs and the executive and administrative personnel of their corporate members	16
III. In addition to being a prior restraint, section (D) otherwise abridges the speech and associational freedoms of plaintiffs and those with whom they share an affinity of interest	29
A. Section (D) abridges First Amendment freedoms and subverts the underlying rationale of *Buckley* v. *Valeo*	31

PAGE

B. Trade associations have the constitutional right to freely solicit contributions from those having an affinity of interest with them 33

C. Section (D) will heighten rather than reduce coercion 37

D. Section (D) unnecessarily burdens First Amendment freedoms 40

E. Invalidating §(D) will achieve the Act's goal of preserving confidence in government 41

IV. Section (D) invidiously discriminates against trade associations in violation of the due proces clause of the Fifth Amendment 43

A. Incorporated trade associations do not enjoy the same solicitation rights as other corporate entities 44

B. Trade associations do not have the same solicitation rights as unions 46

V. Section (D) is vague and overbroad 48

Conclusion 50

LIST OF AUTHORITIES

Cases

PAGE

ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973) *dismissed as moot*, 422 U.S. 1030 (1975) 26, 27

Appalachian Coal Co. v. United States, 288 U.S. 344 (1933) 45

Bread Political Action Committee v. The Federal Election Commission, 591 F.2d 29 (7th Cir. 1979) 6

Bread Political Action Committee v. The Federal Election Commission, 635 F.2d 621 (7th Cir. 1980) (*En Banc*) 11, 20, 28, 31

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Joseph Burstyn v. Wilson, 343 U.S. 495 (1952) 17

California Medical Association v. The FEC, ... U.S. ..... (1981), 49 L.W. 4842 ..... 11, 13, 44

California Medical Association v. The FEC, 641 F.2d 619 (9th Cir. 1980) (*En Banc*) 22, 34

Cantwell v. Connecticut, 310 U.S. 296 (1940) 25

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 21

City of Madison v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 20

CLITRIC v. The FEC, 616 F.2d 45 (2d Cir. 1980) (*En Banc*) 13

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 24

FEC v. American Federation of State, County & Municipal Employees, 471 F.Supp. 315 (D.D.C. 1979) 50

PAGE

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 28, 35, 40, 42

Gitlow v. New York, 268 U.S. 652 (1925) 50

Grayned v. City of Rockford, 408 U.S. 104 (1972) 50

Grosjean v. American Press Co., 297 U.S. 233 (1936) 20, 25

Heffron v. International Society for Krishne Consciousness, Inc., ... U.S. ..... (1981) 19

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 50

Illinois State Board of Election v. Socialist Workers, 440 U.S. 173 (1979) 48

In Re Primus, 436 U.S. 412 (1979) 31

Interstate Circuit v. Dallas, 390 U.S. 676 (1968) 27

Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) 26

Kunz v. New York, 340 U.S. 290 (1951) 26

Largent v. Texas, 318 U.S. 418 (1943) 26

Laurel v. Superior Court of Los Angeles County, 255 Cal. App.2d 292, 63 Cal. Rptr. 114 (1976) 48

Marsh v. Alabama, 326 U.S. 501 (1946) 40, 42

Martin Tractor v. FEC, 627 F.2d 375 (D.C. Cir.), *cert. denied*, ... U.S. ..... (1980) 49

Miranda v. Arizona, 384 U.S. 436 (1966) 39

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 26

NAACP v. Alabama, 357 U.S. 449 (1958) 26

National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) 28

PAGE

Near v. Minnesota, 283 U.S. 697 (1931) 25, 26

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 18, 21, 28

New York Times Co. v. United States, 403 U.S. 713 (1971) 27

Niemotko v. Maryland, 340 U.S. 268 (1951) 26

Nixon v. Administrator of General Services Administration, 433 U.S. 425 (1977) 25

NLRB v. Gissel Packing Co., 395 U.S. 595 (1969) 38

NLRB v. Virginia Power Company, 314 U.S. 469 (1941) 38

Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971) 26

Pipefitters v. United States, 407 U.S. 385 (1972) 34, 36

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 25

Police Department v. Mosley, 408 U.S. 92 (1972) 48

Procunier v. Martinez, 416 U.S. 396 (1974) 28

Saia v. New York, 334 U.S. 558 (1948) 26

Shuttlesworth v. Birmingham, 397 U.S. 147 (1969) 26

United States v. United Auto Workers, 352 U.S. 567 (1957) 28, 35, 41

United States v. Will, ... U.S. ....., 66 L.Ed.2d 392 (1980) 38

Vance v. Universal Amusement Company, 445 U.S. 308 (1980) 27

Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620 (1980) 24

PAGE

irginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976) 20

Wooley v. Maynard, 430 U.S. 705 (1977) 31, 39

Statutes

2 U.S.C. §431 1

2 U.S.C. §434 40

2 U.S.C. §437d 40

2 U.S.C. §437g 15, 40

2 U.S.C. §437h .....*passim*

2 U.S.C. §438(a)(9) 40

2 U.S.C. §441a 40

2 U.S.C. §441(a)(5) 47

2 U.S.C. §441a(a)(5) 40

2 U.S.C. §441b 37, 40, 44

2 U.S.C. §441b(b)(2)(C) 34

2 U.S.C. §441b(b)(3)(B) 37

2 U.S.C. §441b(b)(3)(C) 37

2 U.S.C. §441b(b)(4)(B) 37

2 U.S.C. §441b(4)(C) 44

2 U.S.C. §441b(b)(4)(D) 2, 3, 17

2 U.S.C. §441f 40

2 U.S.C. §441g 40

2 U.S.C. §441j 40

PAGE

18 U.S.C. §610 36

Constitution of the United States

First Amendment ..... *passim*

Fifth Amendment 6, 7, 43, 47, 48

Periodicals

T. Litwack, *The Doctrine of Prior Restraint*, 12 H.C.R.—C.L. Rev. 519 (1967) 21

Other Authorities

Bunke, The Liberal Agony (1963) 21

A. France, Le Lys. Rouge 44

FEC Advisory Opinion 1976-27 50

FEC Advisory Opinion 1976-96 50

FEC Advisory Opinion 1978-17 ..... 32, 50

FEC Advisory Opinion 1978-83 ..... 48, 50

FEC Advisory Opinion 1979-13 49

122 Cong. Rec. 12,199 (daily ed. 5/3/76) (remarks of Congressman Hayes) (H.R. Rep. on S-3065, Federal Election Campaign Act Amendments of 1976) 37

Conference Report No. 94-1057, accompanying S-3065, 4/28/76, at 58 40

2 C.F.R. §110.3(a)(1)(ii) 46

2 C.F.R. § 110.3(a)(1)(ii)(D) 47

2 C.F.R. § 114.1(e) 46

2 C.F.R. § 114.5(g) 46

OPINIONS BELOW

The *En Banc* opinion of the court of appeals is reproduced as Appendix A to Appellants' Jurisdictional Statement and is reported at 635 F.2d 621 (7th Cir. 1980). The earlier panel decision of the court of appeals sustaining jurisdiction pursuant to 2 U.S.C. §437h is reproduced as an Appendix to Appellants' Reply to Motion of the Federal Election Commission to Dismiss the Appeal and is reported at 591 F.2d 29 (7th Cir. 1979).

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1980. Notice of Appeal to this Court was filed on December 18, 1980. (See Appellants' Jurisdictional Statement, Appendix B.) Appellants' Jurisdictional Statement was filed on March 2, 1981. On July 2, 1981, probable jurisdiction was postponed until a hearing on the merits. The jurisdiction of this Court rests on 2 U.S.C. §437h.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appellants' Jurisdictional Statement as Appendix C.

STATEMENT

Summary

This case raises delicate and significant questions concerning the constitutionality of those provisions of the 1976 Amendments to the Federal Election Campaign Act ("the Act")[1] which regulate the solicitation activities of trade associations and their separate segregated funds, commonly known as political action committees or "PACs".[2]

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[1] 2 U.S.C. §431 *et seq.*

[2] The importance and delicacy of the questions involved is best exemplified by the Commission's own acknowledgement below that this case presents "serious constitutional issues" which "go to the heart of" and which have "potential far reaching impact on the . . . Act. . . ." (*See* Jurisdictional Statement at 7, n.11).

Following protracted proceedings in the district court and the court of appeals,[3] the district court made elaborate factual findings[4] regarding, inter alia, the impact of the Act on the solicitation activities of the appellants.[5] The district court found that §441b(b)(4)(D) (App. C, Appellants' Jurisdictional Statement, at 52) had "substantially" curtailed appellants' solicitation activities[6] and their ability to engage in other forms of protected political speech and association. The court also found that the Act had limited the right of persons with similar or related interests to receive from the appellants communications expressing political ideas, opinions, views and beliefs and to associate with the appellants. (Findings 189-194; 197-198; 200).

The district court found that but for the restrictions of §(D), plaintiffs would engage, as they had in the past, in a broad range of solicitation activity directed to those persons with whom there is an affinity of interest. (Findings 108; 140; 144; 199). Indeed, prior to May, 1976, the appellants had solicited voluntary contributions from individuals who shared their political and economic goals, without regard to whether the potential contributor was an

[3] *See infra* at 6.

[4] These Findings are collected in a separate unnumbered volume in the Record and are reproduced in the Joint Appendix at 48-105.

[5] Appellants are the National Restaurant Association ("NRA"); the Restaurateurs Political Action Committee ("RPAC"); the National Lumber and Building Material Dealers Association ("NLBMDA"); Lumber Dealers Political Action Committee ("LuDPAC"); and the Bread Political Action Committee ("Bread-PAC"), the political action committee of the American Bakers Association.

[6] An integral part of these solicitation activities prior to the 1976 Amendments, as well as today, involves discussion and espousal of the political and social ideas, opinions, views and beliefs of each plaintiff concerning matters of national concern and of concern to their respective industries. (Findings 188; 196). *See* note 9, *infra*.

executive or a stockholder of the corporations which comprised the membership of the particular association. These solicitations, which were undertaken at the trade associations' regularly scheduled conventions and meetings and by telephone and mail, were conducted without first having obtained permission from the member corporations (Findings 55-56; 95-97; 120; 123-24; 195).

With the enactment on May 11, 1976 of the Federal Election Campaign Act Amendments of 1976, trade associations were compelled to drastically alter their solicitation activities. Under the Act, trade associations were now permitted only to solicit contributions from the stockholders and the executive and administrative personnel of their corporate members.[7] Moreover, §441b(b)(4)(D) mandated, as an indispensable precondition to such solicitation, that trade associations first obtain the written permission of the member corporation. Once obtained, that permission is operative only in the calendar year in which it is given; and permission can be given by the member corporation only to one trade association PAC, regardless of the number of trade associations to which the particular corporation may belong.[8] Solicitation without compliance with these strictures subjects the solicitor to the criminal and civil sanctions of the Act.

The impact of §(D) on the rights of the appellants and potential solicitees was profound and immediate. In the case of LudPAC, it caused a total cessation of all solicitation activity (Findings 54-58). BreadPAC and RPAC were only scarcely less affected by the throttling restraints of §(D), which have had their intended effect of severely

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[7] While a corporate trade association is also permitted to solicit its *own* executive personnel and stockholders, this category of permissible solicitees is so small as to be virtually non-existent. *See infra* at 43-45.

[8] Findings 98; 140; 144. No comparable restrictions are imposed upon union, corporate or independent PACs. (Finding 201).

limiting the number of individuals to whom solicitation materials could be sent.[9]

In 1975, BreadPAC solicited approximately 1250 individuals. Of this number, approximately 311 contributed a total of $40,190.00. Between January 1, 1976 and May 11, 1976, BreadPAC solicited 1904 individuals. Subsequent to May 11, 1976, the effective date of the Act, all actual solicitation activities ceased and could not be resumed again until the ABA corporate members had given their written approval. As a result, only 462 individuals were solicited from May 11, 1976 through December 31, 1976. (See Plaintiffs' Exhibits 1-24; 1-26).

Again in 1977, there was a dramatic decrease in the number of individuals who could be and were solicited by BreadPAC. In that year, only 577 individuals were allowed by their employers to be solicited. Of this number, only 195 actually made contributions totaling $28,000.00. Of the 7,509 members of the National Restaurant Association in 1977, only 1,087 gave permission to solicit; 6,422 denied permission either explicitly or by failing to respond. (Findings 100-01).

Of perhaps even greater significance was RPAC's inability to solicit the 100,000 people who attended the 1977 NRA Convention in Chicago. Because of the potential im-

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[9] These materials are not tawdry demands for money. Rather, they seek to inform prospective contributors of the PAC's activities, and they speak to the need for likeminded people to associate with each other and to use the PAC as a vehicle for making non-partisan political contributions to those candidates whose views are most consonant with those of the particular industry. Indeed, running throughout these materials is the oft-repeated theme that individual contributions, insignificant in themselves, can be maximized if aggregated through a PAC. See Plaintiffs' Exhibits 1-01-12; 1-16; 1-19-1-23; 2-01; 3-01; 3-03; 3-05; 3-07-09; 3-12-13. Plaintiffs' Exhibits are collected in a separate black binder which is part of the Record. Since the Exhibits each bear the caption "Plaintiffs' Exhibit", we have used that designation in referring to a particular exhibit.

position of criminal and civil sanctions for impermissible solicitation, RPAC found it difficult to enlist people willing to solicit at the Convention. And since it was administratively impossible to cull out the handful of permissible solicitees from those individuals who were not authorized to be solicited, RPAC was forced to abandon any efforts to solicit at the 1977 Convention. (Findings 102-103).

The inhibiting impact of §(D) again was felt in 1978. In that year, the number of persons whom ABA members gave BreadPAC permission to solicit dropped to 421. Of this number, 205 contributed $29,550.00.[10] RPAC also was profoundly affected. Not only was there no solicitation of the 100,000 attendees at the 1978 NRA convention,[11] but the number of individuals authorized by their employers to be solicited by mail dropped precipitously. Of the 15,759 requests to NRA members for permission to solicit their executives, (*see, e.g.*, Plaintiffs' Exhibits 3-04; 3-06; 3-10), only 1,168 members gave permission to solicit a total of 3,196 individuals. Of those solicited, only 393 persons made contributions. (Findings 104-106).

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[10] Findings 128; 139; Plaintiffs' Exhibits 1-26; 1-30. The effect of §(D) on BreadPAC are illustrated in graphic form in Appendix A, *infra*. The Act has also resulted in greatly increased costs and has imposed on BreadPAC additional and cumbersome administrative burdens. (Findings 132-137; Plaintiffs' Exhibit 1-13(a)).

[11] The same situation obtained at the 1979 NRA Convention, where the *in terrorem* effect of §(D) also operated to prevent the late Colonel Harlan Sanders, the founder of Kentucky Fried Chicken, from speaking to the Convention. The Colonel, at RPAC's request and on its behalf, was to address those attending the Convention about RPAC's goals and its political significance. However, since it was uncertain whether such a speech would be construed as a solicitation, and since many of the 100,000 attendees were not within the narrow range of statutorily permissible solicitees, the Colonel was afraid to and did not deliver his speech. (Findings 108-09).

The Proceedings and Opinions Below

In response to the devitalizing impact of §(D), the appellants filed a complaint against the FEC in the United States District Court for the Northern District of Illinois.[12] In December, 1979, the court of appeals held that it and not the district court was the proper forum for initial resolution of the plaintiffs' constitutional challenges. *See Bread Political Action Committee* v. *FEC*, 591 F.2d 29 (7th Cir. 1979). Accordingly, it directed the district court to make findings of fact, prepare a certified record, and identify and certify the constitutional issues raised by the complaint. *Id.* at 36.

Following extensive discovery, the district court certified four constitutional questions to the court of appeals. (J.A. at 105).[13] That court, sitting *en banc* as the court of first impression pursuant to 2 U.S.C. §437h, unanimously reaffirmed its prior holding (*see* 591 F.2d 29) that the plaintiffs had standing to invoke the expedited review provisions of §437h, which the court held embraced claims of unconstitutional application of the Act as well as claims of facial unconstitutionality. In addition, the court unanimously

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[12] The complaint charged that §(D), both facially and as applied: (i) constituted an unconstitutional prior restraint in violation of the First Amendment; (ii) that it abridged the speech and associational rights of the plaintiffs, of those executive and administrative personnel and stockholders of the corporations which comprised the trade associations' memberships, and of those persons who shared an "affinity of interest" with plaintiffs, (iii) that it deprived the plaintiffs of due process of law in violation of the Fifth Amendment in that it imposed substantially dissimilar restrictions upon trade association PACs than were imposed on corporate, union, membership organization, and independent PACs; and (iv) that it was impermissibly vague and overbroad. (J.A. at 24-26, 43).

[13] We seek review by this Court only of questions 1, 2 and 3.

rejected as "frivolous" the FEC's contention that the case did not present a justiciable controversy.[14] 635 F.2d at 625.

However, the court of appeals was sharply divided on the question of whether §(D), both facially and as applied, violated the First Amendment and whether it invidiously discriminated against trade associations in violation of the Due Process Clause of the Fifth Amendment. Five members of the court held that §(D) neither constituted a prior restraint nor otherwise violated the First Amendment. Chief Judge Fairchild and Judges Pell and Bauer vigorously dissented. *Id.* at 636. In addition, they held that even if §(D) did not constitute a prior restraint, it unconstitutionally abridged the speech and associational rights of not only the plaintiffs, but of potential contributors and others with whom the plaintiffs shared an affinity of interest. *Id.* at 637.

The court of appeals was also divided on the question of whether §(D) deprived the plaintiffs of due process of law. Five members of the court answered this question in the negative. The minority held that by requiring trade association PACs to obtain written permission as a precondition to soliciting a member corporation's executive and administrative personnel or their stockholders, while imposing no similar restrictions on the solicitation activities of other PACs, §(D) invidiously discriminated against trade association PACs in violation of the Fifth Amendment. *Id.* at 641.

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[14] While the court unanimously held that §(D) was neither vague nor overbroad, three judges stressed that the FEC had construed the term "solicitation" so broadly that there was a chilling effect on protected speech. See 635 F.2d at 636, n.3.

SUMMARY OF ARGUMENT

I.

To insure that "*all* questions of constitutionality" pertaining to "*any* provision" of the Federal Election Campaign Act would be heard by the Supreme Court at the earliest possible time, the Congress, in 1974, enacted 27 U.S.C. §437h. Both the text and context of that section demonstrate that its applicability is solely a function of the nature of the challenge raised rather than the identity of the plaintiff. The purpose of §437h was to expand traditional notions of standing to allow certain potential plaintiffs who, but for §437h might not have standing under this Court's prudential rules, to initiate constitutional challenges to the Act. Thus, all constitutional challenges to the Act regardless of whether they are raised by one of the three classes of plaintiffs explicitly enumerated in §437h(a) are subject to the Act's expedited review provisions.

II.

The Act prohibits trade associations and their PACs from seeking voluntary contributions from anyone other than stockholders and executive and administrative employees of corporations which comprise the membership of a particular trade association. In addition, before a trade association or its PAC can solicit even this narrow class of statutorily permissible solicitees, it must obtain the written permission of the potential contributor's corporate employer. Finally, a corporation can only grant solicitation privileges to a single trade association in any year despite the fact that the corporation, by virtue of its diverse business interests, may be a member of more than one trade association.

By prohibiting solicitations without the prior written permission of the corporate employer, who has the absolute discretion to grant or deny permission for any reason, the Act has created a system of prior restraint indis-

tinguishable in its censoring affect on speech and associational freedoms from the licensing systems consistently invalidated by this Court.

The abridgement of First Amendment freedoms wrought by the Act cannot be dismissed as insignificant merely because the appellants are free to engage in other constitutionally discrete forms of First Amendment activity. Moreover, the fact that a statute only results in a partial rather than a total paralysis of First Amendment activity does not make constitutionally palatable that which is otherwise impermissible.

Finally, no principled claim can be made that the restrictive effects on First Amendment freedoms are insignificant or marginal. For, as the district court's unchallenged Findings of Fact clearly demonstrate, the Act has substantially curtailed appellants' solicitation activities and their ability to engage in protected political speech and association. Additionally, as the district court found, the Act has limited the rights of persons with similar or related interests to receive from the appellants' communications expressing political ideas and opinions and has impaired their right to associate with the appellants in furtherance of common political aims.

III.

In addition to being a prior restraint, §(D) otherwise abridges the speech and associational freedoms of appellants and those individuals with whom they share an affinity of interest, in that §(D): (1) restricts the ability of appellants to undertake an uncensored program of solicitation with all employees and shareholders of their respective corporate members, and (2) absolutely prohibits appellants from undertaking any solicitation activity with other individuals who share the same economic, social and political goals and beliefs as the appellants themselves.

This scheme of overly broad, randomly operating restrictions and prohibitions does not further the integrity of the electoral process, nor does it foster meaningful and in-

formed participation by citizens in the political process. Rather, §(D) undermines the ability of like-minded individuals to associate through the medium of political committees and, by requiring advance approval of the individual's employer, heightens the potential for coercion in the solicitation process. Moreover, §(D) is neither necessary to, nor does it enhance, the effectiveness of the constitutionally permissible limitations upon political contributions or the elaborate disclosure mechanisms contained in the Act. In short, §(D) serves no compelling governmental interest; rather, it subverts the core purposes of the Act.

IV.

The limitations on trade association solicitation imposed by the Act are invidiously discriminatory. These restrictions, which apply exclusively to trade associations and their PACs, were intentionally imposed to limit their fundraising potential. Moreover, the Act as a whole imposes far fewer restrictions on union, corporate and independent PACs than are imposed on trade associations and their PACs. Such an intentionally discriminatory scheme is violative of the Due Process Clause of the Fifth Amendment.

V.

Section (D) has disavowed the commonly accepted dictionary definition of the word "solicitation" in favor of a broadly sweeping concept which includes "anything which fairly could be deemed a request for a contribution." A statute of such protean contours is incompatible with the First Amendment. The statutory vagueness and overbreadth have made the fundamental right to engage in political speech and association dependent upon the ever-changing episodic judgments of the FEC, which has assumed the role of a super-governmental censor regulating the speech and association of citizens throughout the Nation.

ARGUMENT

I.
JURISDICTION OVER THIS APPEAL IS PROPER UNDER 2 U.S.C. §437h

A.

The Federal Election Campaign Act as amended was the most comprehensive election reform legislation ever enacted by the Congress. Given the Act's labyrinthine complexity and its intersection with the First Amendment, it is not surprising that serious questions were raised about the constitutionality of substantial portions of the Act by those responsible for its passage. *California Medical Association* v. *FEC*, ... U.S. ..... (1981), 49 L.W. 4842, 4844 n. 7. To insure that "*all* questions of constitutionality" pertaining to "*any* provision" of the Act would be heard by *this Court* at the earliest possible time, the Congress, in 1974, enacted §437h. *Id.* at 4844-45.[15]

Both the text and context of §437h make clear that the availability of expedited judicial review under that section is a function of the nature of the challenge raised rather than the identity of the plaintiff. The first sentence of §437h authorizes three types of eligible plaintiffs to institute suits to construe the constitutionality of "*any provision* of [the] Act." (Emphasis supplied). If the Congress intended to limit expedited review to the three explicitly enumerated plaintiffs, it scarcely would have employed such all-embracing language, for it is clear that the specifically enumerated plaintiffs would not have Article

[15] See also Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979), *aff'd*, 635 F.2d 621 (7th Cir. 1980) (*En Banc*).

III standing to contest many of the basic structures of the Act. *See BreadPAC, supra,* 591 F.2d at 31.[16]

The same purposeful use of encompassing language also appears in the second sentence of §437h which mandates, without regard to the identity of the particular plaintiff, that the district court shall immediately certify "*all* questions of constitutionality of" the Act to the court of appeals sitting *en banc.* (Emphasis supplied). "This language further focuses Congress' intent on the questions presented in a suit such as this, rather than on the identity of the plaintiffs. The direction to certify all constitutional questions indicates again that Congress intended the expedited review procedure to apply broadly to challenges to the Act. * * * [T]his purpose would be severely restricted if the first sentence is read as an exclusive grant of standing to the three specific plaintiffs to obtain expedited review." *BreadPAC, supra,* 591 F.2d at 31.

It is difficult to imagine anyone more personally affected by, or interested in, the provisions of the Act dealing with trade associations and their political action committees than trade associations themselves. Yet, acceptance of a narrow construction of §437h would permit parties having no real and substantial interest in matters affecting trade

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[16] There exists the very substantial question whether the latter two classes of plaintiffs enumerated in §437h could in fact maintain an action contesting the Act's trade association provisions. While Congress has the power to accord standing to parties who might otherwise be barred by this Court's "prudential" rules relating to standing, it cannot, by virtue of the case or controversy requirement of Article III, accord standing to a potential litigant who cannot allege and prove a distinct and palpable injury to himself. *See* Warth v. Seldin, 422 U.S. 490, 498-501 (1975). Since it is unlikely that the parties enumerated in §437h could demonstrate such an injury resulting from the Act's trade association provisions, a narrow construction of §437h could theoretically result in a situation in which no one would have standing to initiate judicial review of the Act's trade association provisions under the Declaratory Judgment Act. 591 F.2d at 34, n.36.

associations to seek expedited judicial review of the Act's trade association provisions but would deny that right to those most directly and substantially affected by the Act.

Since, in enacting §437h Congress sought to insure prompt evaluation of the constitutionality of "*any* provision" of the Act, it would not have denied standing to the class most intimately affected by those provisions dealing with trade associations. For prompt evaluation of those provisions would surely not result if *only* the Commission, the national committee of a political party or a voter had standing to seek expedited review in the courts of appeals. It is fatuous to suggest that some anonymous individual, or the national committee of a political party would contest the Act's trade association provisions. And it is idle to contend that the Commission would ever raise a constitutional challenge to the Act upon which it depends for its very sustenance.[17] In sum, restricting §437h to the three classes of enumerated plaintiffs would subvert rather than achieve the goals subserved by that section. *Id.* at 33.

B.

This thesis is supported by *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Buckley* involved broadbased challenges to various provisions of the Federal Electon Campaign Act by individuals and incorporated and unincorporated public interest groups. Despite the fact that the overwhelming majority of the plaintiffs and intervenors were *not* within the parties enumerated in §437h, this Court held that "at least some of the appellants [had]

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[17] The FEC's demonstrated insensitivity to basic First Amendment values, *see, e.g.*, CLITRIC v. FEC, 616 F.2d 45, 53 (2d Cir. 1980) (*En Banc*) (Kaufman, C. J., concurring), and its self-serving tergiversation on fundamental questions concerning the Act's meaning, *see, e.g.*, California Medical Association v. FEC, *supra*, 49 L. W. at 4844, n.8, preclude any argument to the contrary.

a 'sufficient personal stake' in a determination of the constitutional validity of the Act. . . ." *Id.* at 12.

Immediately after this statement, the Court noted that an organization may assert, on behalf of its members, rights personal to them. 424 U.S. at 12, n. 10. This focus on the organizational rather than the individual plaintiffs takes on heightened significance when one recalls that the *district court's* invocation of §437h was predicated solely on the existence among the plaintiffs of eligible voters.[18] This Court, however, manifestly ignored the fact that there were voter-plaintiffs and focused instead on the institutional plaintiffs.

Given the district court's inordinate preoccupation with the status of the *individual* plaintiffs, unless we are to ascribe to this Court an exceedingly high degree of caprice, *Buckley's* focus on the *organizational* plaintiffs, must be construed to mean that the availability of §437h(a) is not limited merely to the three classes of plaintiffs enumerated in that section. *See BreadPAC supra,* 591 F.2d at 35-36.

Other portions of *Buckley* also conclusively demonstrate the spacious reach of §437h. It is obvious that restricting the availability of judicial review only to the Commission, the national committee of a political party, or a voter would *not* provide judicial review to the extent permitted by Article III. Yet, this Court in *Buckley* unequivocally stated that "*[i]t is clear that Congress in enacting 2 U.S.C. §437h . . . intended to provide judicial review to the extent permitted by Article III.*" 424 U.S. at 11-12. (Emphasis supplied). *See BreadPAC, supra,* 591 F.2d at 35. Restricting the reach of §437h to the three classes of expressly enumerated plaintiffs not only would prevent prompt judicial evaluation of the Act, but, in practical effect, would foreclose any challenge to substantial portions of it. *See supra* at 11-12.

[18] *See* Buckley v. Valeo, 387 F. Supp. 135, 142, n.14 (D.D.C. 1975).

C.

Finally *California Medical Association* v. *FEC*, ... U.S. ..... (1981), 49 L.W. 4842, confirms the accuracy of the Seventh Circuit's construction of §437h. At issue in *California Medical* was the question of whether a plaintiff could institute a §437h action following the initiation of an enforcement proceeding by the FEC under §437g.

In rejecting "the cramped construction of the statute proposed by the Commission" as dissonant with and subversive of §437h's goal of expedition in appellate review of constitutional challenges to the Act, *id.* at 4845, the Court emphasized that it was the nature of the challenge to the Act that determined the availability of review under §437h, not the fortuity that there was a pending enforcement proceeding. *See id.* at 4845.

Just as constitutional "questions may arise regardless of whether a Commission enforcement proceeding is contemplated," *id.* at 4845, so too may they arise regardless of the identity of the particular plaintiff initiating the challenge. Yet, "under the Commission's approach even the most meritorious and fundamental challenge to the Act could not be reviewed pursuant to §437h but instead could be considered only pursuant to", *id,* at 4845, the totally unexpedited review procedures employed in federal question cases.

However, if 28 U.S.C. §1331 rather than §437h is to be the fount of jurisdiction in cases such as the one at bar, the following anomalous situation would obtain: instead of expedited, initial resolution of constitutional questions by a Court of Appeals *en banc,* followed by expedited appellate review by this Court (437h(c)), the case would first be decided by a district judge, on a non-expedited basis, subject only to review by a three judge panel of a court of appeals, also on a non-expedited basis. The decision of the court of appeals would then be subject to this Court's *discretionary* review on a non-expedited basis pur-

suant to a petition for *certiorari*. This kind of protracted, multi-tiered judicial review of constitutional challenges to the Act, with its inevitable delays and the uncertainty of ultimate review by this Court, is precisely what §437h was designed to obviate. *See BreadPAC, supra,* 591 F.2d at 33.[19]

In sum, properly construed, §437h is not, as the FEC has twice unsuccessfully argued, a statutorily imposed *restriction* on the availability of expedited judicial review in the courts of appeals and this Court. Rather it represents Congress' desire to *expand* traditional notions of standing so as to allow certain potential plaintiffs who, but for §437h, might not have standing under this Court's prudential rules, to institute actions in the district court. (*See* Affidavits of Senator Buckley and David Keene (J.A. at 107-112). The Seventh Circuit's construction invigorates the Act; the Commission's saps its life by subverting the animating and core purpose underlying §437h. A choice between the two is not hard.

II.

SECTION (D), BOTH FACIALLY AND AS APPLIED, CONSTITUTES A PRIOR RESTRAINT ON THE SPEECH AND ASSOCIATIONAL FREEDOMS OF PLAINTIFFS AND THE EXECUTIVE AND ADMINISTRATIVE PERSONNEL OF THEIR CORPORATE MEMBERS

A.

The Act prohibits trade association PACs from seeking voluntary contributions from anyone other than stockhold-

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[19] Relegating to ordinary federal question jurisdiction constitutional challenges brought by plaintiffs other than those specified in §437h would also result in the following anomaly: regardless of the identity of the defendant, *non*-constitutional challenges raised in enforcement proceedings brought by the Commission would receive the expedited review specified in §437g(a)(11), while *constitutional* (footnote continued)

ers and executive and administrative employees of a corporation which is a member of the particular trade association. In addition, the Act requires that before a trade association PAC can solicit even this narrow class of statutorily permissible solicitees, it first must be granted written permission by the member corporation. 2 U.S.C. §441b(b)(4)(D).[20]

Under the regime of censorship compelled by §(D), corporations have the unbridled power to determine whether they will allow their stockholders or executives to receive political solicitations from the trade association to which they belong. There are no criteria to guide these censorial decisions; instead "the yea or nay saying by [corporate] officials becomes the standard of the permissible." *Joseph Burstyn* v. *Wilson*, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring). There is no review either by an administrative or judicial body of the corporate censor's arbitrary determination of whether it will allow a communication between a PAC and one or more of its stockholders or employees, and the potential recipient has no voice in the matter. Finally, no time frame is established within which the corpor-

(footnote continued)
challenges brought by anyone not explicitly enumerated in §437h would receive no preferential treatment at all. "While Congress could have discerned differences in the need for expedited review among constitutional challenges raised by different parties, it is difficult to conceive a rationale for viewing any non-constitutional challenge as more urgent than one raising constitutional questions, regardless of the identity of the plaintiffs." BreadPAC, *supra*, 591 F.2d at 33.

[20] The member corporation cannot give permission to more than one association PAC each year even though the corporation may be a member of two or more separate distinct associations. Finally, permission once granted is only good for the *calendar* year in which given and must be renewed annually.

ation must respond to a solicitation request.[21] In fact, the Act does not even require the corporate censor to respond, in which event, the failure to respond is treated as a denial of permission.[22]

Despite the operative effect of §(D) and despite its devitalizing impact on the speech and associational rights of literally millions of American citizens,[23] the majority, without any analysis, held that §(D) was not a prior restraint and that any prior restraining effects were, at best, "tenuous" and "marginal' ". 635 F.2d at 628, 629.

This conclusion, which sedulously ignored the district court's unchallenged contrary findings of fact, *id.* at 625, seems to be predicated upon the following premises: solicitation is a form of "political expression" protected by the First Amendment; plaintiffs are engaged on a daily

[21] This is precisely the sort of "freeze" forbidden by the First Amendment. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[22] In 1978, only 6% of the American Bakers Association's members expressly refused permission to solicit; 59% failed to respond to the ABA's requests. The result was that the employees and stockholders of 65% of the companies comprising the ABA could not be solicited. The percentage of ABA members not responding to requests to solicit was double that in 1976. (Finding 128).

[23] Since most trade associations are comprised of corporations (Finding 2), the censorial effect of §(D) is staggering. For example, of the 1600 corporate members of the Direct Mail Marketing Association, only 75 gave permission to solicit a total of 90 individuals in 1978 even though the total pool of permissible (employee) solicitees numbered from 100,000 to 300,000. (*See* Deposition of Francis Andrews at 43-46; 140-47). In 1978, RPAC sent almost 16,000 separate requests to NRA member corporations seeking permission to solicit. Only 1,168 members granted permission to solicit approximately 3,000 individuals, 393 of whom actually contributed. (Findings 104-06) Similarly in 1978, only 35% of the corporations comprising the membership of the American Bakers Association granted permission to BreadPAC to solicit a total of 421 individuals. (Findings 128; 139).

basis unimpeded by §(D), in many *other* forms of "political expression" protected by the First Amendment; therefore, the restraining effects of §(D) on solicitation are constitutionally insignificant since the overall quantum of "political expression" is not materially affected. 635 F.2d at 628.

B.

The flaws in this reasoning are manifold. First the majority overlooked the constitutionally significant fact that solicitation for political contributions is a discrete form of First Amendment activity, separate and distinct from other forms of protected speech and association.[24] That is, while solicitation may be described as a form of "political expression," it is not a fungible part of some monolithic whole encompassing all the varied speech and associational activities which fall within the ambit of the First Amendment. By indiscriminantly characterizing the appellants' widely disparate First Amendment activities, including solicitation, as "political expression" and treating them as identical strands in a seamless web, the majority evaded rather than answered the question of whether §(D) constituted a prior restraint on speech *and associational* freedoms.[25] Moreover, as the minority demonstrated, the fact that a statute only results in a partial, rather than a total, paralysis of First Amendment activity does not make con-

[24] Heffron v. International Society for Krishna Consciousness, Inc., ---- U.S. ----, 69 L.Ed.2d 298, 312 (1981) (Brennan, J., concurring and dissenting).

[25] The majority failed to recognize that a PAC is a separate distinct jural entity, California Medical Association, *supra*, 49 L.W. at 4846, the activities of which differ markedly from those of its related trade association. For example, it is BreadPAC and not the ABA which solicits political contributions and which informs contributors of the philosophies and campaigns of those candidates whose views are most consonant with those of the baking industry. (Finding 155). The same situation obtains with respect to the NRA and RPAC.

stitutionally palatable that which is otherwise impermissible. *See* 635 F.2d at 636.

Perhaps the most troubling aspect of the majority's conclusion that §(D) has not had a restraining effect on political association is its failure to recognize that political solicitation implicates speech and associational rights of the solicitee no less than those of the solicitor.[26] That is, abridgments of the right to solicit political contributions, perforce, affect the correlative fundamental right of the potential contributor to receive political information[27] and to engage in political association through the pooling of political contributions. The statute in the instant case constitutes a significant abridgment of these rights.

It is no answer to say that solicitees are "free" to acquire whatever information about candidates they deem appropriate. Nor are these abridgments to be dismissed as insignificant merely because §(D) does not facially prohibit voluntary contributions by corporate executives to candidates or political committees. For the operative effect of §(D) has been to allow corporate employers the arbitrary power either to delay the transmission or totally deprive citizens of the very information (namely the existence and goals of the PAC) which is essential to their

[26] This failure is especially disturbing in light of i) the explicit allegations in our Complaint that the Act violated the First Amendment rights of potential contributors (*see supra* at (I); J.A. at 23-25); ii) the district court's undisputed Findings of Fact that the Act had materially and adversely affected the rights of potential contributors to receive political information and to associate with the appellant PACs; and iii) the dissenters' emphasis on the impact of §(D) on the rights of potential solicitees. 635 F.2d at 637.

[27] *See* Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748, 756-57 (1976); Grosjean v. American Press Co., 297 U.S. 233, 245 (1936); BreadPAC v. FEC, 635 F.2d at 637 (dissenting opinion). *Cf.*, Madison School Dist. v. Wisconsin Emp. Comm., 429 U.S. 167, 175, n.7 (1976); United States v. CIO, 335 U.S. 106, 143-44 (1948) (Rutledge, J., concurring).

participation in one very significant aspect of the political process. This is precisely what the doctrine of prior restraint is designed to prevent. *See Nebraska Press Ass'n.* v. *Stuart, supra; Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 180, 182 (1968); T. Litwack, *The Doctrine of Prior Restraint,* 12 H.C.R.C.L. Rev. 519 (1977).

A full appreciation of §(D)'s impact on political association necessitates a continued perception of the realities of modern life. The halcyon uncomplicated days of the past are gone forever. "[T]he world of the Founding Fathers is not ours; nor can it ever be." Bunke, The Liberal Agony 280, 290-91 (1963). It is quixotic even to suggest that a person—any person—has the time or the resources to educate himself about the background, the political philosophies, or the aspirations of more than a few *local* candidates, if that. For the average citizen, acquisition of information about candidates in sister states is a practical impossibility. Thus, the "right" to make political contributions in support of the candidacies of those who share one's political and social philosophy is largely illusory, absent the existence of some sort of political structure which can serve as a focal point for political association. It is only through group association and pooled contributions that the average citizen, desirous of advancing deeply felt political and social beliefs through the election, on a nation-wide basis, of "sound thinking" candidates, can hope to amplify his voice and effect the political destiny of the Nation. *See Buckley* v. *Valeo,* 424 U.S. 1, 22, 65-66 (1976).

Nor, for many people, are contributions to the national committee of one of the major or minor parties a constitutionally or politically acceptable substitute for contributions to a trade association PAC. Such contributions will result in subsequent distribution of money solely on a partisan basis, without regard to the consonance of the philsophy of the initial contributor with that of the ultimate recipient.

For the millions of independent voters, such indiscriminate contributions do not allow a meaningful form of political association. And, even for individuals whose political allegiance favors a particular party, contributions to a national committee only go part way towards the election of candidates who share the contributor's deeply felt beliefs on pivotal issues.

For example, not long ago the question of sale of wheat to Russia became the cynosure of political attention. That issue was obviously of critical importance to the baking industry and to those whose economic destinies were inextricably linked to its ebb and flow.[28] For those involved in the industry, the election of candidates who would champion the goals of the industry was a matter of prime importance.

Clearly, the most meaningful and effective form of political association directed towards the nationwide support of candidates who would promote and advocate the goals of the baking industry would be political contributions to BreadPAC which would "serve as a clearing house to facilitate individual or pooled individual political participation. . . ." *California Medical Association* v. *FEC*, 641 F.2d 619, 630 (9th Cir. 1980) (*En Banc*), *aff'd*, ... U.S. ..... (1981). *See also* Complaint, Count One ¶25 (J.A. at 22).

The same situation applies, *mutatis mutandis*, to all vital questions affecting a particular industry. Contributions by association PACs are made on a non-partisan basis, to candidates whose views are most consonant with those of the industry with which the PAC is involved. Thus, the ability to make contributions to a trade association PAC provides the most meaningful—if often not the only—way of enabling corporate executives and stockholders to effectively advance, on a national scale,

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[28] The issue, of course, was of substantially more than merely economic concern, and it evoked substantial political and philosophical controversy.

certain precise and specific economic and political goals.[29] However, by conditioning the right of solicitation on the whim of the employer, §(D) operates to cut off a profoundly important avenue for political association[30]

Equally unacceptable is the majority's second basis for the conclusion that §(D) is not a prior restraint. By totally reconstituting their membership to include only individuals rather than corporations, the majority reasoned, trade associations would thus be free to solicit the individual members, unfettered by the prior permission rule of §(D). 635 F.2d at 628. The notion that the unconstitutional can be miraculously transformed into the constitutional by the alchemy of avoidance accords constitutional dignity to an irrelevance and is contrary to fundamental First Amendment precepts. *See, e.g., Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975).[31]

[29] It is an indisputable fact of economic life that a trade association's advancement of its members' interests inures to the benefit of its members' employees. It is thus beyond cavil that executives and administrators have a common interest with their employer's trade association in the advancement and realization of commonly shared industry aspirations. *See* Deposition of Francis Andrews, 40-41, 49, 58, 111, 137-38; 635 F.2d at 642, n. 11 (dissenting opinion).

[30] In practical effect, the Act places corporations astride certain extremely pivotal channels of communication without the ability of the individual employee to contest in any way the censoring corporation's decision. Indeed, by hypothesis, in the event of a denial of permission to solicit, the corporate employee will probably never learn that a political action committee has even tried to contact him. The bitter irony of this is all too apparent. On the one hand, the Act purports to prohibit direct contributions by corporations because of the baleful influence they purportedly have had on the electoral process, while on the other, it entrusts to these very entities the unregulated power to determine what vast numbers of our citizens can read and hear.

[31] Apart from its irrelevance, the medicament prescribed by the majority would prove lethal to the well being of trade associations. Given the scope of trade associations' activities and their necessarily

(footnote continued)

C.

1.

Finally, the majority's *ex cathedra* pronouncement that §(D) is not a prior restraint constitutes a radical break with fundamental First Amendment theory. By prohibiting solicitations of the executive personnel and the stockholders of corporations comprising the membership of trade associations, without the prior written approval of and permission from the corporate members, §(D) has created a system of prior restraint, indistinguishable in its censoring effect on speech and associational freedoms,[32] from the licensing systems consistently invalidated by this Court.

Recognizing that a principle to be vital must be capable of wider application than the mischief which gave it birth, this Court long ago boldly stepped beyond the narrow doc-

(footnote continued)
large operating budgets, (Findings 93; 186), it is obvious that trade associations could not continue to function financially if they were forced to change their membership composition from one that is predominantly corporate (Finding 2) to one that is predominantly individual in nature. Moreover, the major, albeit unarticulated, premise underlying the majority's method for avoiding the burdens of §(D) (*i.e.*, that corporate executives and stockholders have a sufficient commonality of interest that they would be responsive to an association's membership solicitation), is hopelessly inconsistent with its holding that there is no direct relationship or affinity of interest between a trade association and its corporate members' executives and stockholders. It was this supposed absence of commonality of interest which formed the basis for the majority's holding that §(D) did not invidiously discriminate against trade associations. 635 F.2d at 631.

[32] The soliciting and making of political contributions is a form of speech and associational activity lying at the core of the First Amendment. *See Buckley* v. *Valeo*, 424 U.S. 1, 22, 24-25, 65-66 (1976). *Cf., Village of Schaumberg* v. *Citizens For A Better Environment Inc.*, 444 U.S. 620 (1980); *Eastern Railroad Presidents Conference* v. *Noerr Freight, Inc.*, 365 U.S. 127, 138 (1961).

trine that the First Amendment was designed to eliminate only those previous restraints which bore some formal similarity to those imposed by the English system of administrative censorship. *See, e.g., Near* v. *Minnesota,* 283 U.S. 697 (1937); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). *Cf., Pittsburg Press Company* v. *Pittsburg Commission on Human Relations,* 413 U.S. 376, 389-90 (1973).

In the years since *Near* and *Grosjean,* this Court has continued its refusal to canalize the doctrine of prior restraint within cramped formalistic boundaries and has reaffirmed the principle that constitutional analysis must have "regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." *Near* v. *Minnesota, supra,* 283 U.S. at 708. In addition there has been an expansion of the doctrine to embrace freedom to solicit religious contributions, *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); freedom of speech and assembly, *Thomas* v. *Collins,* 323 U.S. 516, 518 (1945),[33] and freedom of association, *Healey* v. *James,* 408 U.S. 169, 183 (1972).

In an undeviating series of cases, this Court has invalidated, as unconstitutional prior restraints, municipal ordinances which required, as a condition to the exercise of First Amendment freedoms, the issuance of a permit by an administrative official, who had virtual discretion and final authority to grant or deny the permit as the spirit moved him.[34] Each of the decisions in these cases stressed

[33] *Cf.* Staub v. City of Baxley, 355 U.S. 313 (1958) (Ordinance prohibiting the solicitation of membership in dues paying organizations without permit from mayor is an unconstitutional prior restraint).

[34] In Nixon v. Administrator of General Services Administration, 433 U.S. 425 (1977), the Court characterized its decisions in the prior restraint cases as "involv[ing] regulations that permitted public officials in their *arbitrary discretion* to impose prior restraints on expressional or *associational* activities." *Id.* at 467, n.27 (Emphasis supplied).

that the First Amendment will not tolerate a regulatory system which makes the exercise of First Amendment freedoms dependent on unprincipled, unreviewable and capricious administrative judgments. It was not merely the sporadic abuse of power by the censor that so troubled the Court, but the pervasive threat inherent in a censorship system which made it incompatible with the First Amendment. *See Southeastern Promotions Ltd.* v. *Conrad, supra,* 420 U.S. at 553; *Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940).

Thus, municipal ordinances requiring a permit as a precondition to conduct public worship,[35] to use sound amplification devices,[36] to solicit orders or sell books,[37] or to march in a parade[38] were unhesitatingly declared to be unconstitutional prior restraints where they did not contain precisely drawn and narrowly limited criteria governing the issuance of the permit.

2.

Near and its progeny teach that in testing the constitutionality of a statute which is alleged to violate the doctrine of prior restraint "the judicial angle of vision . . . is the operation and effect of the statute in substance."[39] In the instant case, the operative effect of §(D) has been to invest the corporate employers of literally millions of

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[35] Kunz v. New York, 349 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[36] Saia v. New York, 334 U.S. 558 (1948).

[37] Largent v. Texas, 318 U.S. 418, 422 (1943).

[38] Shuttlesworth v. Birmingham, 397 U.S. 147 (1969).

[39] Kingsley Books Inc. v. Brown, 354 U.S. 436, 441 (1957). *See also* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 552-53 (1975); Organization For A Better Austin v Keefe, 402 U.S. 415, 418-20 (1971); Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961); NAACP v. Alabama, 357 U.S. 449, 461 (1958); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Near v. Minnesota, *supra,* 283 U.S. at 708, 709, 711-13, 722; ACLU v. Jennings, *supra.*

American citizens with absolute, unreviewable and arbitrary censorial powers.

By empowering a corporation to determine whether a PAC should be given permission to solicit (and thus whether an executive or stockholder can associate with other like-minded individuals through the medium of the PAC), §(D) has created "an effective censorship", *Near* v. *Minnesota*, 283 U.S. at 712, indistinguishable in its operative effect from those licensing systems consistently repudiated by this Court. *See Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 554 (1975); *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 700 (1978).

In short, the prior permission rule of §(D) is a previous restraint in its most pristine and most dangerous form. *See ACLU* v. *Jennings*, *supra*, 366 F.Supp. at 1051-56. However, since prior restraints are not unconstitutional, *per se*, it must be determined whether §(D) satisfies the exceedingly rigid standards against which any mechanism of prior restraint must be tested.

Beginning with *Near* v. *Minnesota*, *supra*, this Court, with unvarying consistency, has made clear that prior restraints are the least tolerable infringement on First Amendment freedoms and that *any* system of restraint is presumptively unconstitutional. In order for the government to meet *its* exacting burden of proving constitutionality, it must demonstrate: (a) that there exist precisely drawn regulations sufficient to obviate the dangers of a censorship system; (b) that the case falls within the exceptional narrow class of cases allowing prior restraint, such as obscenity, obstruction to the conduct of a declared war (or some "kindred" harm), or incitement to violence; and (c) absent imposition of prior restraint, there will surely result direct, immediate and irreparable damage.[40]

[40] *See* Vance v. Universal Amusement Company, 445 U.S. 308, 317 (1980); New York Times v. United States, 403 U.S. 713, 714 (1971); *id.* at 730-31 (White, Stewart, J. J., concurring); *id.* at

(footnote continued)

Section (D) fails to satisfy any of these criteria. There are no procedural safeguards designed to obviate the dangers of a censorship system, and it is obvious that §(D) does not fall within the limited class of exceptional cases which has sanctioned prior restraints. More importantly, it cannot be "demonstrated with the degree of certainty [the] cases on prior restraint require" that §(D) would "actually . . . serve its [purportedly] intended purpose" of insuring electoral integrity. *Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 569.

"The overriding concern behind the enactment of statutes such as [FECA] was the problem of corruption of elected representatives through the creation of political debts", *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777, n.26 (1978), resulting from lavish financial contributions. *Buckley* v. *Valeo,* 424 U.S. 1, 25-26, 55 (1976); *United States* v. *Auto Workers,* 352 U.S. 567, 571, 574, 578-80, 585 (1957). Since a corporate employer has the right to refuse a solicitation request *for any reason,* the prior permission rule of §(D) is not linked to nor does it have the capacity to insure compliance with the Act's contribution limitations.[41] This case thus differs markedly from

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725-26 (Brennan, J., concurring); Nebraska Press Association v. Stuart, *supra,* 427 U.S. at 558, 563, 569; Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553, 559 (1975). The First Amendment's insistence on the presence of procedural safeguards is not limited to obscenity cases. *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Procunier v. Martinez, 416 U.S. 396, 417-19 (1974). *See also,* BreadPAC v. FEC, *supra,* 635 F.2d at 637 (dissenting opinion).

[41] In the instant case, corporate employers have refused permission to solicit for such varied reasons as the giving of permission to another trade association; the employer's "fear and general apprehension about being involved in the whole political fund area due to the Watergate scandal" and the belief that granting permission to a PAC would require granting permission to various charitable institutions such as the Red Cross, the Cancer Fund and the United Way. (Findings 111; 120-30).

either *Buckley* v. *Valeo*, or *California Medical Association* v. *FEC*, *supra*, which sustained various limitations on First Amendment freedoms since they were designed and had the capacity to insure adherence to the Act's contribution limitations and thereby to achieve the goal of electoral integrity.

Finally the district court's Findings of Fact belie the majority's unsupported conclusion that §(D) has had only a tenuous effect on First Amendment freedoms. That court found that §(D) has substantially curtailed the solicitation activities of the appellants (Findings 188; 197); has limited their ability "to raise voluntary funds for political purposes; [has] limited their ability to engage in protected political speech and association, and [has] limited the right of persons with similar or related interests to receive from the Plaintiffs communications expressing political ideas, opinions, views and beliefs and thereby associate themselves with the Plaintiffs." (Finding 199). *See also* Findings 58; 94; 100-106; 128; 139; 198; 200.

Under these circumstances, there can be no doubt that §(D) is an unconstitutional prior restraint.

III.

IN ADDITION TO BEING A PRIOR RESTRAINT, SECTION (D) OTHERWISE ABRIDGES THE SPEECH AND ASSOCIATIONAL FREEDOMS OF PLAINTIFFS AND THOSE WITH WHOM THEY SHARE AN AFFINITY OF INTEREST.

It is fundamental that First Amendment protections reach beyond prior restraints, and that statutes which affect speech and associational rights may be unconstitutional even though they do not restrain in advance the exercise of those rights. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1 (1976). Such statutes, implicating as they do core First Amendment freedoms, are "subject to the most ex-

acting scrutiny." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).[42]

While tacitly conceding its applicability, the majority below made no attempt to subject the Act to "the rigorous standard of review established by [this Court's] prior decisions. . . ." *Buckley* v. *Valeo, supra*, 424 U.S. at 29-30. Instead, there is only the *ipse dixit* that §(D) does not violate the First Amendment since any abridgement of associational freedoms is "amply justified" by the "overriding [governmental] interest" in insuring the integrity of federal elections and the voluntariness of contributions. 635 F.2d at 627-29.

In what follows, we shall demonstrate that by sustaining the constitutionality of §(D), the majority ignored the basis upon which *Buckley* sanctioned the restrictions on speech and associational freedoms imposed by the Federal Election Campaign Act's contribution limitations; that §(D) abridges the constitutional right of the appellants to freely solicit contributions from those having an affinity of interest with them; that it will give rise to the very coercion it was purportedly designed to dispel; that it is subversive of the Act's goal of fostering individual responsibility; and that it is unnecessary to the realization of the goals sought to be achieved by the Act.

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[42] In order for a statute implicating rights of political association to withstand a First Amendment challenge, it is not enough to show that legislative action is related to the election process. For as *Buckley* itself teaches, that interest cannot be invoked as a talismanic incantation to support any exercise of power. Instead, it must be demonstrated that: the inhibitions on expressional and associational freedoms are truly *necessary* to further the goal of electoral integrity; that absent the curtailment of First Amendment rights, harm will certainly result; that the means employed are the least restrictive of associational freedoms; and that the benefits gained outweigh the harm to constitutionally protected rights. *See* Buckley v. Valeo, *supra*, 424 U.S. at 16; 24-25; 29-30; and *compare id.* at 64-65. *See*

(footnote continued)

A.

Section (D) Abridges First Amendment Freedoms And Subverts The Underlying Rationale Of Buckley v. Valeo

In sustaining the contribution limitations imposed by the 1974 Amendments to the Federal Election Campaign Act, the Court in *Buckley* v. *Valeo* underscored the absence of any severe impact on the speech and associational rights of potential contributors, candidates and political committees. While the Act prohibited unlimited contributions, it freely permitted the making of contributions within defined limits. Since it was the act of contributing, rather than the size of the contribution which symbolized the contributor's support for and served to affiliate him with the recipient of the contribution and with other contributors, 424 U.S. at 21 and 28, n. 3, the Court concluded that the contribution ceilings imposed only a marginal restriction on speech and associational freedoms.[43] Moreover, the contribution limitations did not affect the ability of candidates and political committees to solicit and aggregate large sums of money. It merely required them to raise funds from a greater number of persons. *Id.* at 21-22; 28, n. 31. *See also,* 635 F.2d at 638 (dissenting opinion).

In every respect, §(D) contravenes the doctrinal assumptions on which *Buckley* was predicated. Unlike the contribution limitations in *Buckley,* which imposed no impediments to the symbolic act of contributing, §(D) di-

(footnote continued)
also Wooley v. Maynard, 430 U.S. 705, 716-17 (1977); In Re Primus, 436 U.S. 412, 432-34 (1979); *BreadPAC, supra,* 635 F.2d at 638 (dissenting opinion).

[43] The Court emphasized that while citizens were barred from making large individual contributions, they were free to associate through political action committees, which were allowed to solicit freely. *Id.* at 28, n.31.

rectly, immediately and substantially curtails the solicitation and the making of political contributions. That is, by requiring corporate permission as a pre-condition to solicitation, and by allowing only one trade association to solicit any given employee, the inevitable and intended effect of §(D) is to interdict even the symbolic expression of support evidenced by a contribution.[44]

In addition, by directly and immediately preventing the contribution, §(D) interdicts the very act which serves to affiliate the potential contributor with other like-minded individuals and with the political action committee itself. Consequently, contrary to the situation envisioned by *Buckley*, as a result of §(D), potential contributors are no longer free to associate through political action committees. *See* 635 F.2d at 639 (dissenting opinion). Finally, unlike the situation in *Buckley*, the limitations of §(D) have substantially affected the ability of political committees to solicit and aggregate funds and thus to make political contributions.[45] (*See* Findings 58; 94; 100-106; 128; 139; 197-98; 200).

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[44] There can be no doubt that the restrictions on the solicitation activities of trade association political action committees were imposed with full awareness of the pervasive effect they would have on associational and expressive freedoms. In fact, the FEC has explicitly acknowledged that the underlying purpose of these restrictions "is to control [trade association PACs'] access to the same person who might otherwise be solicited and contribute to several political committees connected to separate trade associations. By requiring advance solicitation approval, and limiting approval by corporate members of a trade association to one trade association per year, the fundraising potential of the trade association committee is limited." *See* Advisory Opinion 1978-17, CCH Federal Election Campaign Financing Guide, ¶5307.

[45] For example, in 1976 and 1978, BreadPAC lacked funds to contribute to eligible candidates whom it desired to support and who made requests to it for contributions. (Finding 145; Plaintiffs' Exhibit 1-15).

B.

Trade Associations Have The Constitutional Right To Freely Solicit Contributions From Those Having An Affinity of Interest With Them

Count I of the Complaint charged that the restrictions of §(D) violated the First Amendment in that they deprived individuals having an affinity of interest from being able to freely associate together. (*See* Count I, ¶31(d), J.A. at 24-25).[46] Judges Pell, Bauer and Chief Judge Fairchild agreed that by curbing the appellants' ability to freely solicit "those with whom they share an affinity of interest", §(D) impermissibly burdened the First Amendment rights of the appellants and of potential solicitees. *See* 635 F.2d at 637.

The majority's rejoinder was in two parts. The first consisted of the *non-sequitur* that while the appellants could not freely solicit they could freely accept contributions from any individual. *See* 635 F.2d at 628. The majority never paused to explain how contributions could be made when the potential contributor was unaware of the existence or purpose of the entity which was to receive the contribution.

The second and more important basis for the majority's rejection appears to be predicated upon the following series of propositions: (1) the long standing prohibition of corporate and union "expenditures" in connection with federal elections has always included the use of corporate and union funds to pay for the administrative costs of a PAC's solicitation activities; (2) such a prohibition is constitutional; (3) by allowing incorporated trade associations to use general funds to defer the administrative ex-

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[46] ¶31(c) charged that the Act violated the First Amendment by impermissibly restricting the class of permissible solicitees to the stockholders and the executive and administrative personnel of corporations comprising the membership of trade associations.

penses of solicitation, §441b(b)(2)(C) accords the association a statutory benefit to which it would otherwise not be constitutionally entitled;[47] (4) and finally—although never expressly articulated—since Congress could prohibit that which in its largesse it has now allowed, it can attach any conditions it deems appropriate. *See* 635 F.2d at 627-28. *See also id.* at 630.

None of the authorities cited by the majority, *id.* at 627, support its conclusion. While those cases sustained Congressional power to impose prohibitions on unrestricted corporate expenditures and contributions, none even remotely considered the question of whether the use of corporate or union treasury funds to defray the administrative expenses of a PAC would be an impermissible "expenditure." Each did, however, recognize that the First Amendment allows corporations and unions to establish PACs and to solicit voluntary contributions to be used for political purposes.

This recognition is, of course, consistent with the Supreme Court's exegesis of the Federal Corrupt Practices Act. In *Pipefitters* v. *United States*, 407 U.S. 385 (1972), the Court reviewed the history and development of §205 of the Federal Election Campaign Act of 1971 which, "with one exception"—which we shall discuss shortly—"merely codifie[d] prior law. . . ." *Id.* at 399 In *Pipefitters*, the Court concluded that despite the apparent breadth of its language, the Federal Corrupt Practices Act was never intended to prevent unions and corporations from making "through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections so long as the monies expended are in some sense

[47] The majority's assumption in this regard is erroneous, for the Hanson Amendment merely took cognizance of the fact that corporations and unions had long used general funds to administer PACs. *See* California Medical Association v. FEC, 641 F.2d 619, 629-30 (9th Cir. 1980) (*En Banc*), *aff'd* ____ U.S. ____ (1981).

volunteered by those asked to contribute." *Id.* at 401. *See also id.* at 402-403.

The possible exception referred to in *Pipefitteers* was whether the explicit statutory authorization in the Federal Election Campaign Act to use union or corporate funds to administer the costs of a PAC's solicitation activities was a modification or a codification of prior law. However, the Court in *Pipefitters* explicitly declined to answer this question. *See* 407 U.S. at 428-432. While *Pipefitters* is not dispositive, guidance is not wholly wanting. Indeed, the Court's earlier decisions in *United States* v. *CIO*, 335 U.S. 106 (1948) and *United States* v. *Auto Workers*, 352 U.S. 567 (1957) are especially illuminating.

From the atmosphere and emanations of *CIO* and *Auto Workers*, there emerges with unmistakable clarity a recognition that corporations and unions do indeed have the First Amendment right to communicate not only with their members and stockholders, but also with their "customers" and people "affiliated with" them. *See* 335 U.S. at 121; 352 U.S. at 592. *See also First National Bank* v. *Bellotti*, 435 U.S. 765, 808 (1978) (White, J., dissenting). But "*[t]his reasoning, of course, applies as well to solicitations for contributions to voluntary political funds.*" *Pipefitters* v. *United States*, 407 U.S. 385, 431, n.42 (1972) (Emphasis supplied). That is, the very same justifications that allow corporations and unions to use their funds to commmunicate on political matters with those having some appropriately close relationship, justify and constitutionally mandate that corporations and labor unions be allowed to use their own funds to defer the costs of PAC solicitation directed to the same class. Such expenditures are not directed to "the public at large" and, thus, do not contravene the purposes underlying the Corrupt Practices Act and its successor, the Federal Election Campaign Act.

The majority met the force of these arguments with the facile, *a priori* conclusion that only unions and their

members and corporations and their executives and stockholders have a commonality or affinity of interest. *See* 635 F.2d at 631. However, as the preceding discussion demonstrates, the majority's conclusions are contrary to the decisions of this Court, and, as Judge Pell so cogently demonstrated, they are analytically indefensible. (*See* 635 F.2d at 639; 642).

Compelling evidence of the validity of the minority's position is to be found in a 1975 opinion letter from Mr. Richard Thornburg, the then Assistant Attorney General of the Criminal Division of the Department of Justice—the agency which, for more than 60 years, has been responsible for prosecutions under the Tillman Act, the Federal Corrupt Practices Act and the Federal Election Campaign Act.

That letter was in response to an FEC request for the Department's legal opinion as to whether 18 U.S.C. §610 could constitutionally prohibit the use of corporate and union funds in connection with PAC solicitation if directed to anyone other than shareholders and union members. In that opinion, "which is entitled . . . to great weight", *Pipefitters* v. *United States,* 407 U.S. 385, 409 (1972), the Department of Justice stated that the prohibition of corporate "contributions and expenditures" could not, consistent with the First Amendment, be so narrowly limited. Rather a corporate (or union) PAC has the constitutional right to use its own funds to defer the costs of solicitation activities directed toward any person or group having an *affinity of interest* with the corporation or union. *See* Jurisdictional Statement, App. D at 53.

Since there is an affinity or commonality of interest between the appellants and the stockholders and executive and administrative personnel of their member corporations, the First Amendment will not tolerate the unnecessary and overbroad restrictions imposed on trade association solicitation by §(D).

C.
Section (D) Will Heighten Rather Than Reduce Coercion

The majority's second justification for the massive dislocation of First Amendment freedoms wrought by §(D) was the purported necessity of "protecting individuals from economic coercion." 635 F.2d at 627. Careful analysis demonstrates that this unsupported contention cannot withstand scrutiny.

Underlying certain subparagraphs of §441b was Congress' desire to protect employees from the undercurrent of pressure which the Congress perceived to be latent in *direct solicitation* by their *own* corporate employers and union superiors. Indeed, the Conference Report accompanying the 1976 Amendments reveals that Congress perceived in such *direct* solicitation the need for imposing appropriate safeguards to insure against reprisals directed toward employees who do not contribute as much as the solicitor thinks appropriate.[48]

Congressional concern with direct corporate (and union) solicitation of its *own* employees (and members) is readily understandable, for the federal courts and the Congress

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[48] To insure that contributions would be freely given, the Congress required that soliciting corporations inform their *own* executive and administrative employees of the political nature of the solicitation and of their right to refuse to contribute without reprisal. *See* 2 U.S.C. §441b(b)(3)(B) and (C); 122 Cong. Rec 12,199 (daily ed. May 3, 1976) (remarks of Congressman Hayes) (H. R. Rep. on S-3065, Federal Election Campaign Act Amendments of 1976). In addition, to assure the anonymity of those who do not wish to respond or those who wish to respond with a small contribution, a corporation's bi-annual solicitation of *its* rank and file employees can be made only by mail addressed to employees at their residence and must be so designed that the soliciting corporation cannot determine who makes a contribution of $50.00 or less and who does not make any contribution. 2 U.S.C. §441b(b)(4)(B).

have long perceived the immediate and direct economic dependence of the employee on his corporate employer or union superiors. And they have been sensitive to the possibility that such direct economic dependence could have a subtle impact on various decisions which the employee may be called upon to make. *See Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960); *NLRB* v. *Gissel Packing Company*, 395 U.S. 575, 617 (1969). *Compare United States* v. *Will*, ... U.S. ..... (1980), 66 L.Ed.2d 392, 408.

However, economic dependency is conspicuously absent in the context of trade association solicitation of its member corporations' *stockholders*. It is also absent in the context of solicitation of its members' administrative and executive employees. *See* 635 F.2d at 639 (dissenting opinion). One searches the legislative history of the Act in vain for even a whisper of Congressional concern that trade association solicitation is somehow coercive. This absence of concern stands in stark contrast to Congress' preoccupation with direct corporate and union solicitation of their *own* employees and members.

By requiring corporate consent as a precondition to solicitation, § (D) has unnecessarily interposed the employer between the trade association and the prospective contributor and has thus "heigten[ed] rather than diminish[ed]" any coercive pressures which might exist. For "[e]xplicit corporate consent to trade association solicitations subtly, yet directly, would appear to suggest to employees that the employer favors a contribution." *Id.*[49] Compare *NLRB* v. *Virginia Power Company*, 314 U.S. 469, 477 (1941); *NLRB* v. *Gissel Packing Company*, *supra* 395 U.S. at 617. *See also*, Plaintiffs' Exhibit 1-31. In short, § (D)

[49] In one sense, §(D) precludes any real freedom of choice, for if consent is unilaterally denied by the employer, the employee will have no choice to make.

will result in the very evil it purportedly was designed to eradicate.

However, even if some minimal degree of coercion were found to inhere in trade association solicitation, § (D) would still be unconstitutional. For the method it has chosen to combat the supposed evil violates the principle that achievement of valid ends cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *See Wooley* v. *Maynard,* 430 U.S. 705, 716-17 (1977); 635 F.2d at 638 (dissenting opinion).

To satisfy the least drastic alternative test, § (D) would be required to mandate that denial of permission to solicit be predicated upon the prevention of coercion. As presently, written, however, § (D) allows a corporation to deny a trade association's request to solicit for *any reason. See supra,* note 41. An obviously less drastic and intrusive means of insuring freedom of choice is the establishment of a system of solicitation which either reminds the prospective contributor that he need not contribute, or that insures the anonymity of the contributor, or both. 635 F.2d at 638. As noted earlier, the efficacy of such alternatives has been recognized by the Congress. *Compare Miranda* v. *Arizona,* 384 U.S. 436 (1966) (system of warnings adequate to dispel coercive effects of custodial interrogation).

Stripped of its pretensions, the majority's thesis is nothing more than paternalism in its worst form. For it assumes, contrary to the most basic tenents of the First Amendment, that our people are incapable of making volitional choices and that they need the paralyzing power of the corporate censor to protect them from a request for a political contribution. But "[t]he First Amendment rejects the 'highly paternalistic' approach of statutes like [§ (D)] which restrict what the people may hear."

First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 791, n.31 (1976).

"In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control" over the channels of political communication. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 56. *Cf.*, *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946). If we are false to this faith, we as a Nation will surely pass to that oblivion which will be our proper receptacle.

D.

Section (D) Unnecessarily Burdens First Amendment Freedoms

The Federal Election Campaign Act and its various Amendments in 1974 and 1976, created an elaborate framework for the regulation of all phases of the election process. The Act has imposed pervasive disclosure and reportin requirements (§434), created substantial civil and criminal sanctions for violations of its provisions (§§ 437g, 441j; *see also* §§437d, 438(a)(9)), and has imposed specific limitations on the amount of money that can be contributed by political committees or individuals (§§441a, and b).

In addition, Congress, in the 1976 Amendments, enacted rigid and explicit "anti-proliferation" provisions "to prevent corporations, labor organizations, or other groups of persons from evading the [Act's] contribution limitations . . . ." (Conference Report No. 94-1057, accompanying S-3065, 4/28/76, at 58). The "anti-proliferation" provisions provide that, for purposes of the contribution limitations, all contributions made by political committees, established, financed, maintained or controlled by any corporation or union shall be considered to have been made by a single political committee. 2 U.S.C. §441a(a)(5). The Act also prohibits contributions through nominees (§441f) and contributions in currency (§441g).

In light of this elaborate mechanism, it is idle to suggest that §(D) is necessary or has the capacity to achieve the goal of electoral integrity by insuring compliance with the Act's contribution limitations. Moreover, such a contention cannot be entertained in light of *Buckley*. There this Court, in rejecting an almost identical argument, held that the contribution limitations, in conjunction with the disclosure requirements and the Act's criminal penalties, were sufficient safeguards against evasion of the Act's contribution limitations. 424 U.S. at 44-47; 55-56; and *Id.* at 236 (Burger, C.J., concurring and dissenting). If, prior to the enactment of the antiproliferation provisions, the Act was adequate to prevent evasion of the contribution limitations, their addition surely makes unecessary the various restraints imposed by §(D). *See* 635 F.2d at 640 (dissenting opinion).

E.
Invalidating §(D) Will Achieve The Act's Goal of Preserving Confidence in Government

Perhaps the basic postulate underlying the First Amendment is that our people have the capacity to make enlightened judgments about matters affecting their political, social and economic destiny and that of the Nation. It may be that these presuppositions are false; however, as Learned Hand once observed, upon them we have wagered our all.

The majority's validation of §(D) makes a mockery of the precepts underlying the First Amendment and reduces to a dead echo the boast that we are a free people. Not only is it contrary to the spirit of the First Amendment, but it is fundamentally at odds with the primal goal of the Federal Election Campaign Act. In *United States* v. *Auto Workers*, 352 U.S. 567 (1957), the Court took care to point out that the purpose of the Federal Corrupt Practices Act was "not merely to prevent the subversion of the integrity of the electoral process. Its

underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." Id. at 575, 590. This same theme was echoed in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), which reaffirmed the *Auto-worker's* formulation and, in addition, expressly held that "equally important" was the goal of "[p]reservation of the individual citizen's confidence in government. . . ." *Id.* at 788-789.

Achievement of these goals surely is not furthered by §(D). For an enlightened citizenry can only exist where the information they receive is uncensored. *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946). Nor can it be suggested that §(D) will help to preserve the individual citizen's confidence in government. It does not take a master of either political science or psychology to recognize that confidence in government cannot exist where the government itself has made the fundamental right to receive political information, to make political contributions, and to associate with those with whom there is an affinity of political interest dependent upon the unprincipled whim of one's corporate employer.

Counterpoised against the palpable harm to First Amendment interests which will result if §(D) is to be sustained, is the absence, if it is invalidated, of any injury either to the public or to the Federal Election Campaign Act itself. Clearly, the various gears and cogs which truly make the statutory machinery effective will not be altered by a declaration of unconstitutionality. There can be no persuasive claim that the restrictions of §(D) are integral to the overall functioning of the Act, or that their cessation will undermine its efficiency. On the contrary, as we have shown above, the restrictions of §(D) not only disserve the First Amendment but are antithetical to the ends sought to be achieved by the Federal Election Campaign Act.

In conclusion, when §(D) is viewed against the backdrop of the entire Federal Election Campaign Act, and when it is realized what a debilitating effect it has on the First Amendment rights of the appellants and countless of our citizens, it can scarcely be suggested, as the FEC did in the court of appeals, that the Congress has struck "an [sic] delicate balance between those who comprise the corporation and the rights of the public." (Gov. Br. at 47).

IV.

SECTION (D) INVIDIOUSLY DISCRIMINATES AGAINST TRADE ASSOCIATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Although the district court found that the restrictions of § (D) apply exclusively to solicitations undertaken by trade associations, that no comparable restraints are imposed on solicitations by independent, corporate and union PACs, and that these restrictions had substantially and adversely affected plaintiffs' solicitation activities, the majority held that § (D) did not invidiously discriminate against trade association. In support of this view, the majority argued that not only do incorporated trade associations have the same solicitation rights, *vis-a-vis* their own executives and stockholders as are enjoyed by any other corporation, but, in addition, are accorded by § (D) "an additional group of potential solicitees not available to other corporate entities."[50] 635 F.2d at 630.

In *Buckley* this Court held that even when a statute facially appears to be evenhanded, "[t]he appearance of fairness, however, may not reflect political reality." 424 U.S. at 31, n.33. As the minority demonstrated, this case presents precisely such a situation, for "the statute as a

[50] (*i.e.* executive and administrative personnel and the stockholders of member corporations).

whole", *California Medical Ass'n.* v. *FEC*, *supra*, 49 L.W. at 4847, imposes far more restrictions on trade association PACs than on any other kind of political committee.

A.

Incorporated Trade Associations Do Not Enjoy the Same Solicitation Rights As Other Corporate Entities

Unlike the situation that obtains with corporations organized for profit, most trade associations are not-for-profit corporations, having no stockholders, and exceedingly small executive and administrative staffs. Thus, the typical for-profit corporation, which is outside the scope of § (D), possesses a substantially greater solicitation pool than does an incorporated trade association. It is thus fanciful to suggest that trade associations are not treated differently than other corporate entities merely because the Act, facially, accords both equal solicitation rights regarding their *own* executives and stockholders. *See* 635 F.2d at 641-642 (dissenting opinion).

Nor is the practical inequality in treatment attenuated because § 441b(4)(C) facially accords trade associations the "right" to solicit their *individual* members. Since the membership of trade associations is comprised almost exclusively of corporations (which cannot make contrbutions (§ 441b) and thus cannot be solicited), the "right" to solicit individual members is illusory. And since most trade associations have few rank and file employees, the "right" to solicit their *own* rank and file is rendered meaningless. *Id.*[51]

The untenability of the majority's arguments becomes even more apparent when applied to a federated trade as-

[51] The majority's conclusion about the supposed equality between trade associations, corporations, membership organizations, and labor unions calls to mind Anatole France's insight in Le Lys Rouge; "The law in its majesty *equally* forbids the rich as well as the poor to sleep under bridges, to be in the streets, and to steal bread." (Emphasis supplied).

sociation like plaintiff National Lumber and Building Materials Dealers Association ("NLBMDA") and its political action committee, Lumber Dealers Political Action Committee ("LuDPAC"). NLBMDA is an incorporated trade association to which belong 27 regional incorporated trade associations, which in turn have some 15,000 retail lumber and building materials dealers as members. Simply stated, it is an association of associations. (Findings 24-25).

If NLBMDA's "members" are deemed to be the 27 regional associations, it is obvious that NLBMDA and other federated trade associations not only do not "have broad solicitation rights," 635 F.2d at 630, they have virtually no solicitation rights. Like other incorporated trade associations, federated associations have no stockholders, exceedingly small executive and administrative staffs, and few, if any, rank and file employees. Thus, in practical application, their solicitation rights are not congruent with those of for-profit corporations.

More importantly, the supposed benefit accorded by § (D) to trade associations in the form of an "additional group of potential solicitees," 635 F.2d at 630, is meaningless when considered in the context of federated associations. If NLBMDA's "members" are the 27 regional trade associations, the "additional group of potential solicitees" will not consist of any stockholders since incorporated trade associations are generally not-for-profit and have no stockholders. This leaves only the approximately 40 executive and administrative personnel of the 27 regional associations which belong to NLBMDA. (Finding 61).

If it be true that "[r]ealities must dominate judgment," *Appalachian Coal Co.* v. *United States*, 288 U.S. 344, 360 (1933), the minority properly concluded that the differences in structure between trade associations and other entities "should give rise to broadened, not restricted solicitation rights for trade associations because the statutory

avenues of solicitation available to corporations and membership organizations prove fruitless when applied to incorporated associations." 635 F.2d at 641 (dissenting opinion).

B.
Trade Associations Do Not Have the Same Solicitation Rights As Unions

The invidiously discriminatory nature of § (D) is dramatically illustrated by a comparison of the solicitation rights accorded trade associations with those accorded unions having a federated structure. Federated unions, such as the AFL-CIO, are composed of a number of International Unions, which in turn, are composed of numerous Locals. While the organizational structure of federated unions is identical to that of federated trade associations, the former are accorded infinitely greater solicitation rights.

For example, the AFL-CIO's PAC can solicit all individual members of all the Locals comprising all of the Internationals with unlimited frequency and without prior permission from the Internationals or the Locals.[52] These solicitations can be independently conducted regardless of whether the PACs of the International Unions have solicited the individual members of the Locals. *See* 2 C.F.R. §114.5(g). *See also* 635 F.2d at 641. Finally, the PACs of the various Internationals are not deemed "affiliated" with the AFL-CIO's PAC for purposes of the contribution limitations of the Act. Thus, contributions from the AFL-CIO's PAC are not aggregated with contributions of the PACs of the International Unions. *See* 2 C.F.R. §110.3(a)(1)(ii).

The treatment accorded federated trade associations by the Act differs drastically. The national association cannot freely solicit the executive and administrative per-

[52] For solicitations purposes, the members of the various Locals are also members of the AFL-CIO. *See* 2 C.F.R. §114.1(e).

sonnel of the corporations comprising the membership of the regional associations which belong to the national association. It must either conduct a joint solicitation with its regional "member" association or have delegated to it those "members" solicitation rights. 635 F.2d at 641. Regardless of the alternative chosen by the national association, there can be no solicitation without the prior written permission of the regional associations' corporate members and without compliance with the other restrictions of § (D). Perhaps the most glaring disparity in treatment is that, unlike the situation which obtains with federated unions, a federated trade association's regional "member"-associations are deemed to be affiliated with the national association for purposes of the Act's contribution limitations. *See* 2 U.S.C. §441(a)(5); 2 C.F.R. 110.3 (a)(1)(ii)(D).

The avowed purpose of the disparate treatment of trade association PACs is to limit their fundraising potential. *See supra* at 32, n.44. Such a purpose cannot survive constitutional scrutiny, for the First Amendment condemns attempts to "[e]qualize the relative ability of individuals and groups to influence the outcome of elections. . . ." The concept "that government may restrict the speech [or, *a fortiori*, the right of association] of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 48-49.

The exacting analysis required by the Due Process Clause of the Fifth Amendment leads to the same conclusion as the First Amendment analysis: there is absent any compelling interest warranting the invidiousness of § (D), and the mechanism chosen by that section to achieve its goals is the antithesis of the least restrictive means, closely tailored to avoid unnecessary abridgement of First

Amendment freedoms.[53] Consequently, § (D) is violative of the Due Process Clause.

V.

SECTION (D) IS VAGUE AND OVERBROAD

For more than a century there has been virtual unanimity of judicial opinion that where the word "solicitation" is used in a statute without being defined, it will be accorded its commonly understood dictionary definition: to importune, entreat, implore, ask, attempt to obtain—in short, to intentionally and specifically request a particular thing. *See e.g., Laurel* v. *Superior Court for Los Angeles County*, 255 Cal. App.2d 292, 63 Cal. Rptr. 114, 118 (1976).

The drafters of the Act, however, have disavowed the dictionary definition in favor of a broad sweeping concept which includes "anything which fairly could be deemed a request for a contribution." (*See* FEC Advisory Opinion 1978-83, CCH Federal Election Campaign Financing Guide, ¶ 5382). A statute of such protean contours is incompatible with the First Amendment, for it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn from his intention and meaning." This the Constitution will not allow. *Thomas* v. *Collins*, 323 U.S. 516, 535 (1944). *See also Buckley* v. *Valeo, supra*, 424 U.S. at 42-43.

While implicitly acknowledging that this was indeed the definition intended by the Congress, 635 F.2d at 632, the court of appeals found the Act neither vague nor overbroad.[54] The court however made no attempt to demon-

[53] The criteria employed in Fifth Amendment Due Process [Equal Protection] analysis are the same as those employed in First Amendment cases. *See* Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Police Department v. Mosley, 408 U.S. 92, 95 (1972).

[54] While joining in this conclusion, Chief Judge Fairchild and Judges Pell and Bauer held that the FEC had construed the term so broadly that there was a chilling effect on protected speech. (635 F.2d at 636).

strate that such a sweeping definition was constitutionally permissible. Instead, it merely adverted to cases sustaining, against vagueness and overbreadth attacks, statutes which have used the term solicitation without explicit definition. 635 F.2d at 631. Since, however, in those cases solicitation was intended to have its customary dictionary definition, they do not support the court's ultimate conclusion.

The court also ignored the recent holding of the District of Columbia Circuit that, as used in the Act, the term "solicitation" is "inherently vague", and "a crucial ambiguity inheres in the word 'solicit'. . . ." *See Martin Tractor* v. *FEC*, 627 F.2d 375 (D.C. Cir.), *cert. denied* 100 S.Ct. 360 (1980). An examination of the FEC's advisory opinions confirms the validity of the D.C. Circuit's conclusion and demonstrates that the limitless sweep of the definition has made it impossible to ascertain what speech will constitute a solicitation. Additionally, the statutory vagueness and overbreadth have allowed the FEC to assume the role of a super-governmental censor, regulating arbitrarily the political speech and association of citizens in every part of the Nation.

For example, in Advisory Opinion 1979-13, the FEC ruled that an article proposed for inclusion in a corporate PAC's regular newsletter would constitute a solicitation "since it describes [the PAC's] activities and encourages participation in [the PAC] by commending the enthusiasm of employees whose participation in [the PAC] has indicated awareness of the connection between their welfare and government policies toward business." CCH Federal Election Campaign Financing Guide, ¶5403. Thus, the article could not be circulated to anyone (including retired executives) who was not a corporate stockholder or executive and who had not been approved for solicitation by the company as required by § (D). Not only is AO 1979-13 predicated upon an atavistic and discredited

conception of the First Amendment,[55] but it demonstrates the imposibility of determining in advance of action, what speech will be deemed a "solicitation."

The vagueness and overbreadth of § (D) have allowed the FEC to prohibit, as a "solicitation," an announcement about the mere existence of a fundraising event (AO 1976-27 and 1976-96, CCH Federal Election Campaign Financing Guide ¶¶5213, 5227), and to require that conspicuous signs and other promotional activity to be used at a PAC booth at a convention be displayed and conducted so that only properly authorized people are exposed. (AO 1978-83; AO 1978-17—CCH, *supra*, at ¶¶ 5382, 5307).

The fact that "it was permissible for the [FEC] to come out differently in these and other cases" 635 F.2d at 632, scarcely supports the conclusion that § (D) is neither vague nor overbroad. On the contrary, it is precisely because the statute gives the FEC such arbitrary latitude in the sensitive area of First Amendment freedoms that it must be declared unconstitutional. *See Hynes* v. *Mayor Of Oradell*, 425 U.S. 610 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:
STANLEY T. KALECZYC
National Chamber Litigation Center, Inc.

JEFFREY COLE
Counsel for Appellants

[55] Since Mr. Justice Holmes' classic dissent in Gitlow v. New York, 268 U.S. 652, 672 (1925), the expression of ideas and opinion is constitutionally protected even if enthusiastically advanced. *See* Buckley v. Valeo, *supra*, 424 U.S. at 43; FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979).

APPENDIX A

EFFECTS OF THE ACT ON THE SOLICITATION ACTIVITIES OF BREADPAC

	1975	1976	1977	1978
Association Membership	298	321	323	363
Percentage of ABA Members Expressly Refusing Permission to Solicit		16%	11%	6%
Percentage of ABA Members Failing to Respond to Request for Permission to Solicit[1]		30%	39%	59%
Total Percentage of Member Corporations Unavailable for Solicitation by BreadPAC		46%	50%	65%
Employees of Member Corporations Solicited	1100	1300/462[2]	577	421
Other Individuals Solicited	150	604/0	0	0
Individuals Contributing	311	310	195	205
Total Amount of Contributions Received by BreadPAC	$40,190	$38,712	$28,000	$29,550

[1] A failure to respond is equivalent to and must be treated the same as a denial of permission to solicit.

[2] Pre May 11, 1976/Post May 11, 1976 figures.